

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 14A

WCC No. 2006-1641

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CURTIS M. MICHALAK

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

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ORDER GRANTING PETITIONER'S MOTION *NUNC PRO TUNC*

**Summary:** Pursuant to ARM 24.5.337, Petitioner moved to amend the Court's Findings of Fact, Conclusions of Law and Judgment in this matter, *nunc pro tunc*. Respondent opposed the motion, arguing that this Court lacks jurisdiction to decide the motion because Respondent has already appealed the Court's Findings of Fact, Conclusions of Law and Judgment to the Montana Supreme Court.

**Held:** Petitioner's motion is granted. Pursuant to Rule 60(a) of the Montana Rules of Civil Procedure, this Court may correct clerical mistakes at any time of its own initiative or on the motion of any party. The Montana Supreme Court has ruled that a district court retains jurisdiction to correct clerical errors even after an appeal has been perfected. The Court made a clerical error in its decision when it misidentified a person in the Findings and Conclusions. Therefore, the Court retains jurisdiction to correct its clerical error.

¶ 1 Pursuant to ARM 24.5.337, Petitioner moves to amend the Court's Findings of Fact, Conclusions of Law and Judgment<sup>1</sup> (Findings and Conclusions), *nunc pro tunc*.

¶ 2 The paragraph at issue in this motion presently reads as follows:

¶ 32 Tim Yoder (Yoder), Felton's nephew who was assisting with the supervision of the wave runners, testified that he saw Petitioner riding the

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<sup>1</sup> 2007 MTWCC 14.

wave runner into the shore and that he looked sore or hurt. Yoder further testified that he noticed blood on the wave runner as Petitioner was getting off of it. Another employee also observed that Petitioner was in pain.<sup>2</sup>

¶ 3 In this paragraph, the Court erroneously identified Tim Yoder (Yoder) as John Felton's (Felton) nephew who was assisting with the supervision of the wave runners. In fact, Felton's nephew who assisted with the supervision of the wave runners was Alfred Dion.<sup>3</sup> But for this misidentification, the balance of the paragraph is correct. That is, Yoder did, in fact, testify that he saw Petitioner riding the wave runner into the shore and that he looked sore or hurt.<sup>4</sup> Yoder also testified that he noticed blood on the wave runner as Petitioner was getting off of it.<sup>5</sup> And, another employee also observed that Petitioner was in pain.<sup>6</sup>

¶ 4 Excluding the error, the paragraph correctly reads:

¶ 32 Tim Yoder (Yoder) testified that he saw Petitioner riding the wave runner into the shore and that he looked sore or hurt.<sup>7</sup> Yoder further testified that he noticed blood on the wave runner as Petitioner was getting off of it.<sup>8</sup> Another employee also observed that Petitioner was in pain.<sup>9</sup>

¶ 5 Respondent opposes Petitioner's motion and argues that this Court is without jurisdiction to decide this motion because Respondent has already appealed the Court's Findings and Conclusions to the Montana Supreme Court. Respondent asserts that, pursuant to ARM 24.5.337, the authority cited in Petitioner's brief, this Court lost jurisdiction in this case when Respondent filed its appeal to the Montana Supreme Court.

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<sup>2</sup> Findings and Conclusions at 7 (footnote citations omitted).

<sup>3</sup> Dion Dep. 7:2-4; 8:19 - 10:13.

<sup>4</sup> Yoder Dep. 12:25 - 13:15.

<sup>5</sup> Yoder Dep. 13:1-12.

<sup>6</sup> Weishaar Dep. 17:21 - 18:21.

<sup>7</sup> Yoder Dep. 12:25 - 13:15.

<sup>8</sup> Yoder Dep. 13:1-12.

<sup>9</sup> Weishaar Dep. 17:21 - 18:21.

¶ 6 Respondent also directs the Court's attention to Mont. R. Civ. P. 60(a). Pursuant to ARM 24.5.352, this Court may look to the Montana Rules of Civil Procedure for guidance. Pertinent to the present issue, Rule 60(a) states:

**Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record, and in pleadings, and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

¶ 7 In interpreting this issue, the Montana Supreme Court has held, "Clerical mistakes and errors are those errors which misrepresent the court's original intention."<sup>10</sup>

¶ 8 Relying on selected language from *Muri*, *supra*, Respondent argues that this Court lacks jurisdiction to correct clerical errors when an appeal has already been filed with the Montana Supreme Court. Specifically, Respondent relies on the following language:

Muri contends that the Franks' motion for relief from judgment was untimely because it was filed after the time for filing of a notice of appeal from the Amended Judgment had elapsed. As is clear from the language of the rule itself, however, a court may correct a clerical mistake "at any time." "So long as there is no currently-pending appeal, this may be taken quite literally." 12 *Moore's Federal Practice* § 60.12(1)(a). Therefore, we conclude that the District Court retained jurisdiction pursuant to Rule 60(a) to correct clerical mistakes . . . .<sup>11</sup>

Respondent's reliance upon the language excerpted above is misplaced.

¶ 9 In *Powder River County v. State*,<sup>12</sup> the Montana Supreme Court stated:

After notice [of appeal] has been filed, the District Court retains jurisdiction only to correct clerical errors and jurisdiction over ancillary matters, as well as some jurisdiction over matters involving appeal such as undertaking of costs, stay of judgment, and matters involving transcript on appeal.<sup>13</sup>

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<sup>10</sup> *Muri v. Frank*, 2001 MT 29, ¶ 12, 304 Mont. 171, 18 P.3d 1022.

<sup>11</sup> *Id.* at ¶ 14 (emphasis in Liberty's Reply Brief in Opposition to Nunc Pro Tunc Request omitted).

<sup>12</sup> *Powder River County v. State*, 2002 MT 259, 312 Mont. 198, 60 P.3d 357.

<sup>13</sup> *Id.* at ¶ 27, 312 Mont. at 206, 60 P.3d at 364-65 (citing *Powers Mfg. Co. v. Leon Jacobs Enter.*, 216 Mont. 407, 411-12, 701 P.2d 1377, 1380 (1985)).

¶ 10 The language of Rule 60(a) is unambiguous. A clerical error may be corrected **at any time**. The Supreme Court's decision in *Powder River County* (citing *Powers Manufacturing Company*) reaffirms this Court's reading of Rule 60(a). Correcting the Court's clerical error in paragraph 32 of its Findings and Conclusions does not change, in any way, the substance of this Court's decision. Yoder's observations of Petitioner shortly after Petitioner's injury was the substantive portion of this paragraph, not Yoder's lineage, or lack thereof, relative to Felton. Similarly, this correction does not apply different legal rules or factual analyses to the case. This error was nothing more than a scrivener's error that is easily correctable. That being so, it would be foolish not to do so.

### ORDER

¶ 11 Paragraph 32 of the Findings and Conclusions is amended to read as follows:

¶ 32 Tim Yoder (Yoder) testified that he saw Petitioner riding the wave runner into the shore and that he looked sore or hurt.<sup>14</sup> Yoder further testified that he noticed blood on the wave runner as Petitioner was getting off of it.<sup>15</sup> Another employee also observed that Petitioner was in pain.<sup>16</sup>

The footnotes contained in the amended paragraph will also be adjusted to reflect correct citations.

¶ 12 This ORDER is certified as final for purposes of appeal.

¶ 13 Any party to this dispute may have twenty days in which to request reconsideration from this ORDER.

DATED in Helena, Montana, this 24<sup>th</sup> day of April, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Sydney E. McKenna  
Larry W. Jones  
Submitted: April 5, 2007

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<sup>14</sup> Yoder Dep. 12:25 - 13:15.

<sup>15</sup> Yoder Dep. 13:1-12.

<sup>16</sup> Weishaar Dep. 17:21 - 18:21.